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CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

## **ASSEMBLY BILL**

**No. 52**

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**Introduced by Assembly Member Gatto  
(Principal coauthor: Assembly Member Alejo)  
(Coauthors: Assembly Members Chesbro and Lowenthal)**

December 21, 2012

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An act to add Sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 21084.3 to the Public Resources Code, relating to Native Americans.

### **LEGISLATIVE COUNSEL’S DIGEST**

AB 52, as amended, Gatto. Native Americans: California Environmental Quality Act.

Existing law, the Native American Historic Resource Protection Act, establishes a misdemeanor for unlawfully and maliciously excavating upon, removing, destroying, injuring, or defacing a Native American

historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources.

The California Environmental Quality Act, referred to as CEQA, requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA requires the lead agency to provide a responsible agency with specified notice and opportunities to comment on a proposed project. CEQA requires the Office of Planning and Research to prepare and develop, and the Secretary of the Natural Resources Agency to certify and adopt, guidelines for the implementation of CEQA that include, among other things, criteria for public agencies to following in determining whether or not a proposed project may have a significant effect on the environment.

This bill would specify that a project ~~having a potential to~~ *with an effect that may cause a substantial adverse change to in the significance of* a tribal cultural resource, as defined, ~~to be~~ *is* a project that may have a significant effect on the environment. The bill would require a lead agency to consult with ~~a Native American tribes tribe that are~~ *is* traditionally and culturally affiliated with the geographic area of the proposed project ~~and have, if the tribe requested to the lead agency or the California Native American Heritage Commission, in writing, to be informed by the lead agency of proposed projects in that geographic area and the tribe requests consultation,~~ prior to determining whether a negative declaration, mitigated negative declaration, or environmental impact report is required for a project. ~~The bill would also require the lead agency to consult with Native American tribes on the adequacy of the proposed negative declaration, mitigated negative declaration, or environmental impact required for the project.~~ The bill would specify examples of mitigation measures that may be considered to avoid or minimize impacts on tribal cultural resources. The bill would make the above provisions applicable to projects that have ~~filed~~ a notice of preparation or a notice of negative declaration *filed* or mitigated negative declaration on or after January 1, 2015. The bill would require the Office

of Planning and Research to revise the guidelines to separate the consideration of cultural resources from that for paleontological resources and add consideration of tribal cultural resources. By requiring the lead agency to consider these effects relative to Native Americans and to conduct additional consultations, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. (a) The Legislature finds and declares all of the
- 2 following:
- 3 (1) Current state law provides a limited measure of protection
- 4 for sites, features, places, objects, and landscapes with cultural
- 5 value to California Native American tribes.
- 6 (2) Existing law provides limited protection for Native American
- 7 sacred places, including, but not limited to, places of worship,
- 8 religious or ceremonial sites, and sacred shrines.
- 9 (3) The California Environmental Quality Act (Division 13
- 10 (commencing with Section 21000) of the Public Resources Code)
- 11 does not readily or directly include California Native American
- 12 tribes' knowledge and concerns. This has resulted in significant
- 13 environmental impacts to tribal cultural resources and sacred
- 14 places, including cumulative impacts, to the detriment of California
- 15 Native American tribes and California's environment.
- 16 (4) As California Native Americans have used, and continue to
- 17 use, natural settings in the conduct of spiritual practices, religious
- 18 observances, ceremonies, and cultural practices and beliefs, these
- 19 resources reflect the tribes' continuing cultural ties to the land and
- 20 their traditional heritages.
- 21 (5) Many of these archaeological, historical, cultural, and sacred
- 22 sites are not located within the current boundaries of California
- 23 Native American reservations and rancherias, and therefore are
- 24 not covered by the protectionist policies of tribal governments.

(b) In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:

(1) Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.

(2) Establish ~~that a consultation process for~~ federally recognized Native American tribes in California ~~have a tribal government role~~ in the California Environmental Quality Act.

(3) Establish a new category of resources in the California Environmental Quality Act called “tribal cultural resources” that considers the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation.

(4) Recognize that California Native American tribes *may* have expertise with regard to their tribal history and practices, which concern the tribal cultural resources ~~and associated environment~~ with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the ~~land~~, *land and* tribal cultural resources, ~~and associated environment~~ at issue should be included in environmental assessments for projects that may have a significant impact on those resources.

(5) Establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of project proponents and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decisionmaking body of the lead agency.

(6) Ensure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the

1 potential for delay and conflicts in the environmental review  
2 process.

3 (7) Enable California Native American tribes to manage and  
4 accept conveyances of, and act as caretakers of, tribal cultural  
5 resources.

6 (8) Establish that a substantial adverse change to a tribal cultural  
7 resource has a significant effect on the environment.

8 SEC. 2. Section 21073 is added to the Public Resources Code,  
9 to read:

10 21073. "Native American tribe" means a federally recognized  
11 Indian tribe located in California.

12 SEC. 3. Section 21074 is added to the Public Resources Code,  
13 to read:

14 21074. (a) (1) ~~Unless a preponderance of the evidence~~  
15 ~~demonstrates that the resources are not culturally significant,~~ "tribal  
16 "Tribal cultural resources" are either of the following:

17 (A) Sites, features, places, *and* objects with cultural value to  
18 descendant communities, *as those communities are described in*  
19 *the 1990 Guidelines for Evaluating and Documenting Traditional*  
20 *Cultural Properties, National Register Bulletin 38, National*  
21 *Register of Historic Places, National Park Service, Washington*  
22 *D.C.*, or cultural landscapes that are consistent with the guidance  
23 of the United States National Park Service and the federal Advisory  
24 Council on Historic Preservation, that are ~~included in~~ any of the  
25 following:

26 (i) ~~The~~ *Included in the* California Register of Historical  
27 Resources.

28 (ii) ~~A~~ *Included in a* local register of historical resources as  
29 defined in subdivision (k) of Section 5020.1.

30 (iii) A resource deemed to be significant pursuant to criteria set  
31 forth in subdivision (c) of Section 5024.1.

32 (B) Sacred places including, but not limited to, Native American  
33 sanctified cemeteries, places of worship, religious or ceremonial  
34 sites, or sacred shrines that meet either of the following criteria:

35 (i) Listed on the California Native American Heritage  
36 Commission's Sacred Lands File pursuant to Section 5097.94 or  
37 5097.96.

38 (ii) Listed or determined pursuant to criteria set forth in  
39 subdivision (g) of Section 5024.1 to be eligible for listing in the  
40 California Register of Historical Resources.

(2) The fact that a resource is not included in the California Register of Historic Places, not listed in California Native American Heritage Commission's Sacred Lands File, not included in a local register of historical resources, not deemed significant pursuant to criteria set forth in subdivision (c) of Section 5024.1, or not deemed eligible pursuant to criteria set forth in subdivision (g) of Section 5024.1 for listing in the California Register of Historic Places shall not preclude a lead agency from determining whether the resource is a tribal cultural resource for the purposes of this division.

(b) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2, 21083.2 may also be a tribal cultural resource if it conforms with the criteria of paragraph (1) of, or the lead agency determines the resource to be a tribal cultural resource pursuant to paragraph (2) of, subdivision (a).

SEC. 4. Section 21080.3.1 is added to the Public Resources Code, to read:

21080.3.1. (a) Native American tribes that are traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources *and may assist the lead agency* in identifying, interpreting, and determining significance of tribal cultural resources and whether an impact of a proposed project to a tribal cultural resource is significant.

(b) Prior to determining whether a negative declaration, mitigated negative declaration, or environmental impact report is required for a project, the lead agency shall consult, regarding the appropriate level of environmental review for a project, with *a* Native American ~~tribes~~ *tribe* that ~~are~~ *is* traditionally and culturally affiliated with the geographic area of the proposed project ~~and have if: (1) the Native American tribe requested to the lead agency or the Native American Heritage Commission, agency, in writing, to be informed by the lead agency through formal notification of proposed projects in that geographic area. If area, and (2) the Native American tribe responds to, in writing, within 30 days of receipt of the formal notification, and requests the consultation shall proceed and shall be deemed concluded as described in subdivision (d) of Section 21080.3.2: consultation.~~ For purposes

1 of this section, "Consultation" shall have the same meaning as  
2 provided in Section 21080.3.2.

3 (c) To expedite the requirements of this section, the Native  
4 American Heritage Commission shall assist the lead agency in  
5 identifying the traditionally and culturally affiliated Native  
6 American tribes. The lead agency formal notification to the  
7 traditionally and culturally affiliated Native American tribes that  
8 have requested notice shall be accomplished by means of at least  
9 one written notification that includes information about the project  
10 and the project location and description, consistent with the  
11 information about the project required to be provided under  
12 paragraph (1) of subdivision (b) of Section 21092, and shall be  
13 deemed sufficient to qualify as formal notification pursuant to  
14 subdivision (b).

15 SEC. 5. Section 21080.3.2 is added to the Public Resources  
16 Code, to read:

17 21080.3.2. (a) For the purposes of this section and Section  
18 21080.3.1, "consultation" means the process of acting in good  
19 faith in seeking, discussing, and considering carefully the view of  
20 others, and, where feasible, seeking agreement. Consultation  
21 between public agencies and Native American tribes shall be  
22 conducted in a way that is mutually respectful of each party's  
23 sovereignty, tribal cultural values, and confidentiality as provided  
24 in Section 21082.3.

25 ~~(b) (1) If the lead agency has distributed a proposed negative~~  
26 ~~declaration or mitigated negative declaration, the lead agency shall~~  
27 ~~engage in consultation with a Native American tribe that responded~~  
28 ~~to the formal notification described in Section 21080.3.1 no later~~  
29 ~~than the comment period described in Section 21091.~~

30 ~~(2) If the lead agency has distributed a notice of preparation of~~  
31 ~~an environmental impact report, the lead agency shall engage in~~  
32 ~~consultation with a Native American tribe that responded to the~~  
33 ~~formal notification described in Section 21080.3.1 prior to the end~~  
34 ~~of the comment period described in Section 21091.~~

35 (e)

36 (b) As a part of the consultation process, the parties may propose  
37 mitigation measures, including, but not limited to, those  
38 recommended in Section 21084.3, capable of avoiding or  
39 substantially lessening potential significant impacts to a tribal  
40 cultural resource or alternatives that would avoid significant

1 impacts to a tribal cultural resource. If the Native American tribe  
2 requests consultation regarding alternatives to the project,  
3 recommended mitigation measures, *or* significant effects, ~~or ranges~~  
4 ~~of action to be analyzed~~, the consultation shall include those topics.  
5 The consultation may include discussion concerning the  
6 significance of tribal cultural resources, the significance of the  
7 project's impacts on the tribal cultural resources, and, if necessary,  
8 project alternatives or the appropriate measures for preservation  
9 or mitigation that the Native American tribe may recommended  
10 to the lead agency.

11 ~~(d)~~

12 (c) The consultation shall be considered concluded at the point  
13 at which the authorized representative of the lead agency  
14 participating in the consultation or the Native American tribe,  
15 acting in good faith, concludes that mutual agreement cannot be  
16 reached.

17 ~~(e)~~

18 (d) (1) This section does not limit the ability of a Native  
19 American tribe or the public to submit information to the lead  
20 agency regarding the significance of the tribal cultural resources,  
21 the significance of the project's impact on tribal cultural resources,  
22 or any appropriate measures to mitigate the impact.

23 (2) This section does not limit the ability of the lead agency or  
24 project proponent to incorporate changes and additions to the  
25 project as a result of the consultation, even if not legally required.

26 (3) This section is not intended to replace the existing mitigation  
27 preference for historical and archaeological resources requiring  
28 the lead agency, when feasible, to first consider preservation in  
29 place.

30 ~~(f)~~

31 (e) If the project proponent or its consultants participate in the  
32 consultation, those parties shall respect the principles set forth in  
33 this section.

34 ~~(g) It is the intent of the Legislature that the lead agency shall~~  
35 ~~engage in early and meaningful consultation with Native American~~  
36 ~~tribes that begins at the scoping period prior to the determination~~  
37 ~~of project alternatives and before the public review period for the~~  
38 ~~environmental documents. Each party shall act in good faith in~~  
39 ~~compliance with these provisions and their compliance shall be~~  
40 ~~governed by a rule of reason.~~



1     ~~(h)~~

2     (f) This section shall apply only to a project that has a notice of  
3 preparation or a notice of negative declaration or mitigated negative  
4 declaration filed on or after January 1, 2015.

5     SEC. 6. Section 21082.3 is added to the Public Resources Code,  
6 to read:

7     21082.3. (a) Any mitigation measures agreed upon in the  
8 consultation conducted pursuant to Section 21080.3.2 shall be  
9 recommended for inclusion in the environmental document and  
10 in an adopted mitigation monitoring program, if determined to  
11 avoid or lessen the impact pursuant to paragraph (2) of subdivision  
12 (b), and shall be fully enforceable ~~through conditions, agreements,~~  
13 ~~or measures.~~

14     (b) If a project may have a significant impact on a tribal cultural  
15 resource, the lead agency's environmental document shall discuss  
16 both of the following:

17     (1) Whether the proposed project has a significant impact on  
18 an identified tribal cultural resource.

19     (2) Whether feasible alternatives or mitigation measures,  
20 including those measures that may be agreed to pursuant to  
21 subdivision (a), avoid or substantially lessen the impact to the  
22 identified tribal cultural resource.

23     (c) (1) Any information, including, but not limited to, the  
24 location, nature, and use of the tribal cultural resource that is  
25 submitted by a Native American tribe during the consultation  
26 process may not be included in the environmental document or  
27 otherwise disclosed by the lead agency or any other public agency  
28 to the public without the prior consent of the tribe that provided  
29 the information. If the lead agency publishes any information  
30 submitted by a Native American tribe during the consultation  
31 process, that information shall be published in a confidential  
32 appendix to the environmental document unless the tribe that  
33 provided the information consents, in writing, to the disclosure of  
34 some or all of the information to the public. This subdivision does  
35 not prohibit the confidential exchange of the submitted information  
36 between public agencies that have lawful jurisdiction over the  
37 preparation of the environmental document.

38     (2) This subdivision does not affect or alter the application of  
39 subdivision (r) of Section 6254 of the Government Code.

1 (3) This subdivision does not prevent a lead agency or other  
2 public agency from describing the information in general terms in  
3 the environmental document so as to inform the public of the basis  
4 of the lead agency's or other public agency's decision without  
5 breaching the confidentiality required by this subdivision.

6 (d) The lead agency may ~~issue a permit or grant an approval~~  
7 *certify an environmental impact report or adopt a mitigated*  
8 *negative declaration* for a project with a significant impact on an  
9 identified tribal cultural resource only if one of the following  
10 occurs:

11 (1) Mitigation measures agreed to during the consultation  
12 process pursuant to subdivision (a) or another agreement have  
13 been recommended to the decisionmaking body of the lead agency  
14 as mitigation measures in the final environmental document and  
15 mitigation monitoring program.

16 (2) The Native American tribe accepts the mitigation measures  
17 proposed in the draft or final environmental document and  
18 mitigation monitoring and reporting program.

19 (3) Consultation between the Native American tribes and the  
20 lead agency has occurred pursuant to Section 21080.3.2.

21 ~~(4) The Native American tribe has received notice of, and has~~  
22 ~~failed to comment on or reject, the proposed mitigation measures~~  
23 ~~during the public comment period established in Section 21091~~  
24 ~~and any public hearing on the project required by or held pursuant~~  
25 ~~to this division.~~

26 (e) If the mitigation measures recommended by the staff of the  
27 lead agency as a result of the consultation process are not included  
28 in the environmental document or if there are no agreed upon  
29 mitigation measures at the conclusion of the consultation, and if  
30 substantial evidence demonstrates that a project will cause a  
31 significant effect to a tribal cultural resource, the lead agency shall  
32 consider feasible mitigation pursuant to subdivision ~~(a)~~ (b) of  
33 Section 21084.3.

34 (f) This section is not intended, and may not be construed, to  
35 limit consultation between the state and tribal governments,  
36 existing confidentiality provisions, or the protection of religious  
37 exercise to the fullest extent permitted under state and federal law.

38 (g) This section shall apply only to a project that has a notice  
39 of preparation or a notice of negative declaration or mitigated  
40 negative declaration filed on or after January 1, 2015.

SEC. 7. Section 21083.09 is added to the Public Resources Code, to read:

21083.09. On or before January 1, 2016, the Office of Planning and Research shall prepare and develop, and the Secretary of the Natural Resources Agency shall certify and adopt, revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 4 of the California Code of Regulations to do both of the following:

(a) Separate the consideration of paleontological resources from cultural resources and update the relevant sample questions.

(b) Add consideration of tribal cultural resources with relevant sample questions.

SEC. 8. Section 21084.2 is added to the Public Resources Code, to read:

21084.2. (a) ~~A project may have a significant effect on the environment if the project has the potential of causing a substantial adverse change to a tribal cultural resource with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.~~

(b) This section shall apply only to a project that has a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after January 1, 2015.

SEC. 9. Section 21084.3 is added to the Public Resources Code, to read:

21084.3. (a) ~~If Public agencies shall, when feasible, seek to avoid damaging effects to any tribal cultural resource.~~

(b) If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process provided in Section 21080.3.2, the following are examples of mitigation measures that, if feasible, may be considered to avoid or minimize the significant adverse impacts:

(1) Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.

1 (2) Treating the resource with culturally appropriate dignity  
2 taking into account the tribal cultural values and meaning of the  
3 resource, including, but not limited to, the following:

4 (A) Protecting the cultural character and integrity of the  
5 resource.

6 (B) Protecting the traditional use of the resource.

7 (C) Protecting the confidentiality of the resource.

8 (3) Permanent conservation easements or other interests in real  
9 property, with culturally appropriate management criteria for the  
10 purposes of preserving or utilizing the resources or places.

11 (4) Protecting the resource.

12 ~~(5) (a) Any of the examples of treatments set forth in Section~~  
13 ~~21083.2, if they do not conflict with paragraphs (1) to (4),~~  
14 ~~inclusive.~~

15 ~~(b) Public agencies shall, when feasible, seek to avoid damaging~~  
16 ~~effects to any tribal cultural resource.~~

17 (c) This section shall apply only to a project that has a notice  
18 of preparation or a notice of negative declaration or mitigated  
19 negative declaration filed on or after January 1, 2015.

20 SEC. 10. (a) This act does not alter or expand the applicability  
21 of the California Environmental Quality Act (Division 13  
22 commencing with Section 21000) of the Public Resources Code)  
23 concerning projects occurring on Native American tribal  
24 reservations or rancherias.

25 (b) This act does not prohibit any Native American tribe or  
26 nonfederally recognized tribe from participating in the California  
27 Environmental Quality Act on any issue of concern as an interested  
28 person, citizen, or member of the public.

29 (c) This act does not prohibit any lead agency from consulting  
30 with nonfederally recognized Native American tribes.

31 SEC. 11. No reimbursement is required by this act pursuant to  
32 Section 6 of Article XIII B of the California Constitution because  
33 a local agency or school district has the authority to levy service  
34 charges, fees, or assessments sufficient to pay for the program or  
35 level of service mandated by this act, within the meaning of Section  
36 17556 of the Government Code.